BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

GLORIA DOMINGUEZ	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,046,681
PRICE CHOPPER	)	
Self-Insured Respondent	)	

ORDER

Claimant appealed the November 24, 2009 preliminary hearing Order entered by Administrative Law Judge Kenneth J. Hursh.

ISSUES

Claimant alleges a series of injuries to her shoulders, upper back and neck that occurred while working for respondent. She requests temporary total disability benefits and medical benefits. In the November 24, 2009 preliminary hearing Order, ALJ Hursh found the claimant proved she injured her shoulders and/or upper back in the course and scope of employment. The ALJ, however, denied claimant's requests as he found claimant did not provide timely notice of her accident to respondent.

Claimant requests the Board to reverse the November 24, 2009 Order. Claimant contends she sustained accidental injury arising out of and in the course of her employment with respondent on March 13 and 14, 2009, and continuing through May 30, 2009. And although claimant maintains the two March dates are when the onset of her injuries occurred, based on evidence in the record claimant contends it is reasonable to conclude that she confused the dates of her injury and, therefore, dates in late February 2009 are consistent with her testimony about the onset of her injuries. Claimant also maintains she provided timely notice of her injuries to respondent.

Respondent requests the Board to affirm the preliminary hearing Order, finding that claimant did not provide timely notice of her alleged accident to respondent. Respondent argues claimant did not provide sufficient and timely notice of her alleged accident. Respondent also requests the Board to find that claimant did not prove she sustained accidental injury arising out of and in the course of her employment. Respondent maintains claimant's testimony is inconsistent with respondent's uncontradicted evidence.

The issues before the Board on this appeal are:

1. Did claimant sustain accidental injury arising out of and in the course of her employment with respondent?

2. Did claimant provide timely notice of her accident to respondent?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds and concludes:

The claimant worked in a grocery store. She split her time between housekeeping/maintenance and the produce department. The claimant is not a good historian. She testified that she started experiencing pain in her shoulders, upper back and neck on March 13 and 14, 2009, while lifting boxes of bananas. Claimant also indicated the injury occurred on the day bananas were on sale, February 27, 2009.

Claimant sought medical treatment for her shoulder, upper back and neck pain by seeing her personal physician, Dr. Erica Gibson, on April 9, 2009. Records on that date from Dr. Gibson's office note that three weeks prior, claimant started having bilateral shoulder pain after working in produce lifting 50 pounds at a time and that she had verbally notified her supervisor of the pain. The claimant saw several more doctors regarding her neck and shoulder pain. The medical records throughout the record are consistent with claimant's testimony about the mechanism of the injury.

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the various conditions on which that right depends.[1] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."[2]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the

[1] K.S.A. 2008 Supp. 44-501(a).

[2] K.S.A. 2008 Supp. 44-508(g).

> employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[3]

The respondent contends the claimant is not credible due to her inability to remember circumstances surrounding her injury and as such has not sustained her burden of proof that her injury arose out of and in the course of her employment with the respondent. The ALJ found the claimant sustained her burden of proof.

While claimant's testimony is inconsistent as to the shifts and days she worked and when bananas were on sale, claimant testified she sustained an accidental injury while working for the respondent. The medical records support her testimony. Claimant has sustained her burden of proof. The ALJ's finding in this regard is affirmed.

The ALJ, based on an accident date of February 27, 2009, found the claimant did not provide timely notice. The ALJ's determination that notice was required within 10 days of February 27, 2009, was error.

The claimant alleges a series of accidents. Claimant's job duties included repetitive activities – lifting boxes and loading and unloading produce. Although claimant did not work in the produce department every day, her hours worked in the produce department were sufficient to find her injuries were caused by a series of accidents and repetitive use.

When an accident occurs as a result of a series of events one must look to K.S.A. 44-508(d) to determine the date of the accident.

> In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based

[3] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

> on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing. Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.[4]

The plain language of the statute states that when an accident occurs due to a series of accidents or repetitive use and the employee is not taken off work or restricted from performing the work that caused the accident by the authorized physician, the date of the accident is the date written notice is given. Claimant was not taken off work nor restricted from performing her job duties by an authorized physician before written notice of the injury was provided to respondent. Consequently, the date of the accident is the date written notice was provided.

Richard Balistreri, respondent's store manager, testified that on June 1, 2009, claimant verbally reported to him that she sustained an injury at work. Mr. Balistreri arranged for claimant to see a physician at Occupational Health Services. Before attending that appointment, on June 2, 2009, claimant saw Dr. Gibson, who provided claimant a note setting out certain work restrictions. Claimant then gave that note to respondent. This note is found to be written notice to the respondent of claimant's work-related injuries.

The date of accident is June 2, 2009, the same date it is determined that written notice was provided to respondent. Consequently, claimant provided timely notice pursuant to K.S.A. 44-520.

At this juncture in the proceeding this Board Member finds the claimant did sustain injuries arising out of and in the course of employment with the respondent and notice of such accident was timely.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[5] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

WHEREFORE, this Board Member modifies the November 24, 2009 preliminary hearing Order entered by ALJ Hursh. The ALJ's finding that claimant sustained accidental injury arising out of and in the course of employment with the respondent is affirmed. The

---

[4] K.S.A. 2008 Supp. 44-508(d).

[5] K.S.A. 44-534a.

ALJ's finding that notice was not timely is reversed. The matter is remanded for further orders on claimant's request for preliminary benefits.

IT IS SO ORDERED.

Dated this ____ day of February, 2010.

CAROL L. FOREMAN
BOARD MEMBER

c: Leah B. Burkhead, Attorney for Claimant
Timothy G. Lutz, Attorney for Respondent
Kenneth J. Hursh, Administrative Law Judge